

## THE CONSTITUTIONAL FAMILY IN THE LAW OF SUCCESSION

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### I INTRODUCTION

South African law's traditional definition of 'family' in its narrow meaning refers to heterosexual spouses in a valid civil marriage and their children.<sup>1</sup> However, the notion of the 'constitutional family' — the family concept redefined under constitutional imperatives — is a pertinent feature of South African jurisprudence since the advent of our democratic constitutional dispensation; in fact, the term 'constitutional family' has become accepted and frequently used legal terminology in the post-1994 era.<sup>2</sup>

Unsurprisingly, the constitutional family took judicial and legislative shape not only in South African family law,<sup>3</sup> but also in the law of succession. In the latter regard South African High Courts and the Constitutional Court produced, particularly since 2003, a considerable volume of constitutional case law that marked a break with the traditional exclusive family concept in favour of a wider inclusive conception of 'family.' The judgments dealt specifically with the application of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 to family relationships beyond the ambit of the traditional nuclear family as constituted through a valid civil marriage. The landmark Constitutional Court judgments in this regard are *Daniels v Campbell*,<sup>4</sup> *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA*,<sup>5</sup> *Volks v Robinson*,<sup>6</sup> *Gory v Kolver (Starke & others intervening)*<sup>7</sup> and *Hassam v Jacobs*.<sup>8</sup>

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<sup>1</sup> D S P Cronjé & Jacqueline Heaton *South African Family Law* 2 ed (2004) 3.

<sup>2</sup> See eg Julia Sloth-Nielsen & Belinda van Heerden 'The constitutional family: Developments in South African family law jurisprudence under the 1996 Constitution' (2003) 17 *International Journal of Law, Policy and the Family* 121.

<sup>3</sup> See eg *Minister of Home Affairs v Fourie (Doctors for Life International, Amici Curiae)*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) and the consequent Civil Union Act 17 of 2006.

<sup>4</sup> 2004 (5) SA 331 (CC).

<sup>5</sup> 2005 (1) BCLR 1 (CC).

<sup>6</sup> 2005 (5) BCLR 446 (CC).

<sup>7</sup> 2007 (4) SA 97 (CC).

<sup>8</sup> 2009 (5) SA 572 (CC).

This judicial activity regarding the aforementioned two statutes was not unexpected, as intestate succession and spousal maintenance are closely aligned to socio-economic and legal notions of how a family is constituted.<sup>9</sup> To date the South African legislature has contributed to the redefinition of the family concept (for purposes of the discussion that follows) principally through the Recognition of Customary Marriages Act 120 of 1998, the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005, the Civil Union Act 17 of 2006 and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. The (somewhat controversial) draft Bill on Islamic Marriages (originally proposed in 2003) and the draft Domestic Partnerships Bill, 2008 will, if enacted, add to legislative activity in this regard.

This contribution traces the development of the constitutional family in the law of succession through, first, a synopsis of the aforementioned Constitutional Court judgments as well as a number of High Court judgments on the application of the Intestate Succession Act and the Maintenance of Surviving Spouses Act and, secondly, an overview of legislative developments regarding these two statutes. Thereafter, an attempt is made at the extraction of the constitutional underpinnings of the aforementioned developments. Next, the effect of case law and legislative activity on the term 'spouse' for purposes of the aforementioned two statutes is tabulated and its current and future effect on the relevant provisions of the Intestate Succession Act is explained.

## II THE 'PROBLEMATIC' PROVISIONS OF THE INTESTATE SUCCESSION ACT AND MAINTENANCE OF SURVIVING SPOUSES ACT

### (1) *The Intestate Succession Act*

Section 1 of the Intestate Succession Act determines how intestate estates are divided amongst deceased persons' intestate heirs.<sup>10</sup> Section 1(1) of the Act regulates such division in the successive parentelae of the South African intestate succession system. The Act designates the deceased's surviving spouse as an intestate heir. Moreover, inheritance by the deceased's intestate heirs in the second and further parentelae can occur only if the deceased is not survived by a spouse or a descendant. Despite the central position that a deceased's surviving spouse assumes in respect of inheritance from the deceased's intestate estate, the Intestate Succession Act contains no definition of 'spouse.' However, it was traditionally accepted that 'spouse' for purposes of the Intestate Succession Act means a surviving partner to a valid civil

<sup>9</sup> See generally M J de Waal 'The social and economic foundations of the law of succession' (1997) 2 *Stell LR* 162.

<sup>10</sup> The Intestate Succession Act commenced on 18 March 1988 and was amended by the Law of Succession Amendment Act 43 of 1992. The latter Act commenced on 1 October 1992.

marriage.<sup>11</sup> Moreover, ‘spouse’ is throughout the Act used in the singular, which was traditionally taken to denote one spouse only.<sup>12</sup>

The Intestate Succession Act determines that a deceased’s surviving spouse fits into the scheme of intestate succession as follows:

- s 1(1)(a): if the deceased is survived by a spouse, but not by a descendant, such spouse inherits the intestate estate;
- s 1(1)(c)(i): if the deceased is survived by a spouse as well as a descendant, such spouse inherits a child’s share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice<sup>13</sup> by notice in the *Government Gazette*,<sup>14</sup> whichever amount is the greater;
- s 1(1)(d)–(f): division of an intestate estate in the second and further parentelae can occur only if the deceased is not survived by a spouse or a descendant;
- s 1(4)(f): for purposes of s 1(1)(c)(i), a child’s share of an intestate estate is calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived the deceased or who have died before the deceased but are survived by their descendants, plus one; and
- s 1(6): if a descendant of a deceased, excluding a minor or mentally ill descendant, who, together with the surviving spouse of the deceased is entitled to a benefit from an intestate estate, renounces the right to receive such a benefit, such benefit vests in the surviving spouse.

## (2) *The Maintenance of Surviving Spouses Act*

The Maintenance of Surviving Spouses Act<sup>15</sup> provides a ‘survivor’ in certain circumstances with a maintenance claim against the estate of a deceased spouse. Section 2(1) of the Act determines that, if a marriage is dissolved by death after the commencement of the Act, the survivor has a claim against the estate of the deceased spouse for the provision of the survivor’s reasonable maintenance needs until death or remarriage in so far as the survivor is unable to provide therefore from own means and earnings. ‘Survivor’ for purposes

<sup>11</sup> De Waal supra note 9 at 173. In fact, one of the invariable consequences of the conclusion of a valid civil marriage is that the status of the spouses changes to enable intestate inheritance by the surviving spouse on the death of the first-dying spouse: see Cronjé & Heaton supra note 1 at 49.

<sup>12</sup> Section 6(b) of the Interpretation Act 33 of 1957 determines that, in every law, words in the singular number include the plural unless a contrary intention appears. The Intestate Succession Act bears reference throughout to ‘spouse’ and, unlike the use of ‘descendant’ in s 1(1) and ‘descendants’ in s 1(4)(a), therefore provides no indication that ‘spouse’ encompasses multiple spouses — it is thus arguable that, in this regard, the singular does not include the plural. See further the discussion of *Hassam v Jacobs* supra note 8 infra under III (6).

<sup>13</sup> Now the Minister of Justice and Constitutional Development.

<sup>14</sup> Currently R125 000 in terms of GN 483 GG 11188 of 18 March 1988.

<sup>15</sup> The Act commenced on 1 July 1990.

of the Act is defined in s 1 thereof as ‘the surviving spouse in a marriage dissolved by death.’ The Act defines neither ‘surviving spouse’ nor ‘marriage,’ but, as with the Intestate Succession Act, these terms were traditionally afforded the meaning of a surviving partner to a valid civil marriage.<sup>16</sup> Similarly, the use of the singular ‘survivor’ throughout the Act was traditionally taken to denote a single surviving spouse only.<sup>17</sup>

### III A SYNOPSIS OF JUDGMENTS ON THE PROVISIONS OF THE INTESTATE SUCCESSION ACT AND MAINTENANCE OF SURVIVING SPOUSES ACT

#### (1) *Daniels v Campbell*

In the court a quo of *Daniels v Campbell*<sup>18</sup> Van Heerden J held that the omission from s 1(4) of the Intestate Succession Act of a definition of ‘spouse’ that includes a husband or wife married in accordance with Muslim rites in a de facto monogamous union is unconstitutional and invalid. She ordered that this unconstitutionality had to be cured through a reading-in of such a definition in a new para (g) to follow after s 1(4)(f) of the Act.<sup>19</sup> Moreover, the judge held that the omission from s 1 of the Maintenance of Surviving Spouses Act of a definition of ‘survivor’ that includes the surviving husband or wife of a de facto monogamous union solemnized in accordance with Muslim rites is unconstitutional and invalid. She ordered that this unconstitutionality had to be cured through a reading-in of such a definition in s 1 of the Act.<sup>20</sup>

In *Daniels v Campbell*<sup>21</sup> the majority of the Constitutional Court set aside the above order of Van Heerden J. Both Sachs J and Ngcobo J held that, for purposes of the two Acts in issue, the word ‘spouse’ must be given its ordinary meaning, which, according to both judges, is inclusive of parties to a monogamous Muslim marriage.<sup>22</sup> The Constitutional Court, therefore, ordered that ‘spouse’ as used in the Intestate Succession Act and ‘survivor’ as used in the Maintenance of Surviving Spouses Act includes the surviving partner to a monogamous Muslim marriage.<sup>23</sup>

<sup>16</sup> *Daniels v Campbell* 2003 (9) BCLR 969 (C) at 988B; *Hassam v Jacobs* supra note 8 para 45.

<sup>17</sup> *Hassam v Jacobs* [2008] 4 All SA 350 (C) para 21.

<sup>18</sup> 2003 (9) BCLR 969 (C).

<sup>19</sup> At 1005A–C.

<sup>20</sup> At 1005D–E. See the critique of this decision by Nazeem Goolam & Christa Rautenbach ‘The legal status of a Muslim wife under the law of succession: Is she still a whore in terms of South African law?’ (2004) 2 *Stell LR* 369.

<sup>21</sup> 2004 (5) SA 331 (CC).

<sup>22</sup> Paragraphs 19, 21, 30 and 57.

<sup>23</sup> Paragraph 40.

(2) *Bhe v Magistrate, Khayelitsha*

In *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA*<sup>24</sup> the Constitutional Court declared, inter alia, that s 23 of the Black Administration Act 38 of 1927 is inconsistent with the Constitution and invalid.<sup>25</sup> Moreover, the Court declared that s 1(4)(b) of the Intestate Succession Act is inconsistent with the Constitution and invalid.<sup>26</sup> The Court ordered further that s 1 of the Intestate Succession Act applies to intestate deceased estates that would formerly have been governed by s 23 of the Black Administration Act.<sup>27</sup> However, in applying s 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act in this regard to the estate of a deceased person who was survived by more than one spouse, Langa DCJ ordered the implementation of the following rule:

- ‘(a) A child’s share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;
- (b) each surviving spouse shall inherit a child’s share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice and Constitutional Development by notice in the *Gazette*, whichever is the greater; and
- (c) notwithstanding the provisions of sub-para (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.’<sup>28</sup>

(3) *Volks v Robinson*

In the court a quo of *Robinson v Volks*<sup>29</sup> Davis J ruled that the omission from the definition of ‘survivor’ in s 1 of the Maintenance of Surviving Spouses Act of the words ‘and includes the surviving partner of a life partnership’<sup>30</sup> at the end of the existing definition is unconstitutional and invalid. He ordered that this unconstitutionality had to be cured through a reading-in of the words ‘and includes the surviving partner of a life partnership’ after the words ‘dissolved by death’ in the definition.<sup>31</sup> Moreover, the judge found that the

<sup>24</sup> 2005 (1) BCLR 1 (CC).

<sup>25</sup> Paragraph 136.

<sup>26</sup> Paragraph 136. Section 1(4)(b) of the Act determines that ‘intestate estate’ for purposes of s 1 of the Act includes any part of any estate which does not devolve by virtue of a will or in respect of which s 23 of the Black Administration Act does not apply.

<sup>27</sup> Paragraph 136.

<sup>28</sup> Paragraph 136. In paragraph 125 Langa DCJ emphasized that the above rule constitutes a qualification, rather than a substitution, of, particularly, s 1(4)(f) of the Act.

<sup>29</sup> 2004 (6) BCLR 671 (C).

<sup>30</sup> In casu the life partners were heterosexual.

<sup>31</sup> At 684G–H.

omission from the existing definitions in s 1 of the Act of a definition of 'spouse' that includes a person in a permanent life-partnership and of 'marriage' that includes a permanent life-partnership is unconstitutional and invalid. He ordered that this unconstitutionality had to be cured through a reading-in of such definitions in s 1 of the Act.<sup>32</sup>

In *Vòlks v Robinson*<sup>33</sup> the majority of the Constitutional Court declined to confirm the order of Davis J. The majority judges were concerned, first, with unduly straining the words of the Maintenance of Surviving Spouses Act through the inclusion of permanent life-partners thereunder.<sup>34</sup> Secondly, the majority opined that any discrimination on the basis of marital status occasioned by the exclusion of permanent life-partners from the Act does not constitute unfair discrimination.<sup>35</sup> The fact that heterosexual couples enjoy freedom of choice regarding marriage and, consequently, that a heterosexual couple's decision not to marry negates their entitlement to the protection afforded by the Act, constituted a third reason why the majority did not confirm the court a quo's order.<sup>36</sup>

#### (4) *Gory v Kolver*

In the court a quo of *Gory v Kolver*<sup>37</sup> Hartzenberg J found that the omission after the word 'spouse' wherever it appears in s 1(1) of the Intestate Succession Act of the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' is unconstitutional. The judge ordered that this unconstitutionality had to be cured through a reading-in of the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' after the word 'spouse' wherever it appears in s 1(1) of the Act.<sup>38</sup>

In *Gory v Kolver (Starke & others intervening)*<sup>39</sup> the Constitutional Court, despite not confirming the order of Hartzenberg J in its entirety, nevertheless concluded that the judge correctly found that s 1(1) of the Intestate Succession Act is unconstitutional and invalid as indicated above.<sup>40</sup> Moreover, the reading-in of the words ordered by the court a quo is indeed the appropriate remedy in casu.<sup>41</sup> Van Heerden AJ, therefore, declared that, with effect from 27 April 1994, the omission after the word 'spouse' wherever it appears in s 1(1) of the Intestate Succession Act of the words 'or partner in a

<sup>32</sup> At 684I–685B.

<sup>33</sup> 2005 (5) BCLR 446 (CC).

<sup>34</sup> Paragraphs 41–5.

<sup>35</sup> Paragraphs 49–50 and 60.

<sup>36</sup> Paragraph 91. See the critique of this decision by Anita Cooke 'Choice, heterosexual life partnership, death and poverty' (2005) 122 *SALJ* 542.

<sup>37</sup> 2006 (5) SA 145 (T).

<sup>38</sup> At 159C–E.

<sup>39</sup> 2007 (4) SA 97 (CC).

<sup>40</sup> Paragraph 19.

<sup>41</sup> Paragraph 26.

permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' is unconstitutional and invalid. She ordered that, with effect from 27 April 1994, s 1(1) of the Act is to be read as though the words 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support' appear after the word 'spouse' wherever the latter word appears in s 1(1) of the Intestate Succession Act.<sup>42</sup>

(5) *Kambule v The Master*

In *Kambule v The Master*<sup>43</sup> the applicant, K, who was married to the deceased, B, in terms of customary law until the latter's death, claimed, inter alia, maintenance from the deceased's estate in terms of the Maintenance of Surviving Spouses Act. However, the deceased was, until his death, also married to NB by civil rites according to the provisions of the Black Administration Act — the deceased's marital status was therefore polygynous. Pickering J held as follows regarding the applicant's maintenance claim:

'Once the concession has been made that there is no room for any discriminatory interpretation of the section [s 2(1) of the Maintenance of Surviving Spouses Act] it cannot be contended that the surviving partner to a valid customary marriage which in terms of s 2(1) of the Recognition Act [the Recognition of Customary Marriages Act] is to be "for all purposes" recognised as a marriage, is not a "spouse" within the meaning of s 2(1) of the Maintenance of Surviving Spouses Act. There can be no doubt whatsoever, in light of the provisions of s 2(1) of the Recognition Act and on a proper, constitutionally acceptable interpretation of s 2(1) of the Maintenance of Surviving Spouses Act, that, if the applicant can establish that she was validly married at customary law to Burton [the deceased] at the time of his death, she would fall within the definition of "survivor" in terms of s 2(1) of the Maintenance of Surviving Spouses Act.'<sup>44</sup>

Judgment was consequently given in favour of the applicant and the executor of the deceased's estate was ordered to amend the first and final liquidation and distribution account by admitting the applicant's claim for maintenance against the deceased estate.<sup>45</sup>

(6) *Hassam v Jacobs*

In the court a quo of *Hassam v Jacobs*<sup>46</sup> Van Reenen J dealt with the question whether, on the facts before the court, the applicant, as one of the surviving spouses to a polygynous Muslim marriage, could claim a child's share of the

<sup>42</sup> Paragraph 66(f). See the critique of this decision by Michael Cameron Wood-Bodley 'Intestate succession and gay and lesbian couples' (2008) 125 *SALJ* 46. See further Michael Cameron Wood-Bodley 'Establishing the existence of a same-sex partnership for purposes of intestate succession' (2008) 125 *SALJ* 259.

<sup>43</sup> 2007 (3) SA 403 (E).

<sup>44</sup> At 414D–F.

<sup>45</sup> At 406E–F and 414G–H.

<sup>46</sup> [2008] 4 All SA 350 (C).

deceased spouse's intestate estate in terms of the Intestate Succession Act and reasonable maintenance from the deceased spouse's estate in terms of the Maintenance of Surviving Spouses Act.<sup>47</sup> Van Reenen J ordered, first, that the word 'survivor' as used in the Maintenance of Surviving Spouses Act includes the surviving partner to a polygamous Muslim marriage.<sup>48</sup> Secondly, that the word 'spouse' as used in the Intestate Succession Act includes a surviving partner to a polygamous Muslim marriage.<sup>49</sup> Thirdly, that s 1(4)(f) of the Intestate Succession Act is inconsistent with the Constitution to the extent that it makes provision for only one spouse in a Muslim marriage to be an intestate heir of the deceased spouse. Consequently, Van Reenen J ordered that s 1(4)(f) of the Act is to be read as if the whole of it was substituted by the following:

'In the application of section 1(1)(c)(i) to the estate of a deceased person who is survived by more than one spouse:

- (a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;
- (b) Each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice and Constitutional Development by notice in the *Gazette*, whichever is the greater; and

<sup>47</sup> See Pieter Bakker 'Toepassing van Islamitiese reg in Suid-Afrika' (2008) 29 *Obiter* 533 on why the applicant in *casu* should in fact not have been regarded as the surviving spouse of the deceased by reason of her obtaining a *faskh* (an annulment of a marriage in terms of Islamic law) prior to the deceased's death. However, both Van Reenen J in the court *quo* and Nkabinde J in the Constitutional Court proceeded on the basis that the applicant's marriage to the deceased was indeed extant at the time of the latter's death.

<sup>48</sup> Paragraph 23.1.1–23.1.3. The judge was fortified in this conclusion by the fact that, despite the word 'survivor' in the Maintenance of Surviving Spouses Act being throughout preceded by the definite article 'the', denoting the singular, ie one survivor, the directive in s 6 of the Interpretation Act (*supra* note 12) warranted the conclusion that 'survivor' for purposes of the Maintenance of Surviving Spouses Act can indeed also mean 'survivors'; moreover that the mechanisms in the Act for determining the extent of a surviving spouse's claim are capable of being applied irrespective of the number of spouses at hand and without unduly straining the language of the Act (para 21). From a terminological perspective it is curious that Van Reenen J, while throughout the judgment using the term 'polygynous', employs 'polygamous' when making the order. According to Cronjé & Heaton *supra* note 1 at 191, polygyny is the practice by which a husband is permitted to take more than one wife; polyandry, on the other hand, is the practice by which a wife may take more than one husband, whereas polygamy permits both sexes to have more than one spouse. Muslim marriages are, therefore, polygynous without necessarily being polygamous. The judge should have been terminologically consistent in this regard. Nkabinde J approached this terminological matter correctly in the Constitutional Court's judgment in *Hassam* para 1.

<sup>49</sup> Paragraph 23.1.4–23.1.6. See the comment on terminology *supra* note 48.



- (c) Notwithstanding the provisions of sub-para (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.<sup>50</sup>

The orders in respect of s 1(4)(f) of the Intestate Succession Act were referred to the Constitutional Court for confirmation.<sup>51</sup>

In *Hassam v Jacobs*<sup>52</sup> Nkabinde J distinguished the judgment in *Daniels v Campbell* from the present matter, particularly in so far as reading 'spouse' in the Intestate Succession Act as bearing reference to more than one spouse would, unlike the Act's application to a monogamous Muslim marriage in *Daniels*, indeed place an undue strain on the language of the Act. Consequently, the constitutional invalidity of the impugned provisions of the Intestate Succession Act had to be cured through a reading-in of words to cure the defects.<sup>53</sup> The reading-in involved adding the words 'or spouses' after each use of the word 'spouse' in the Act. The judge therefore ordered that s 1 of the Intestate Succession Act is inconsistent with the Constitution and invalid to the extent that it does not include more than one spouse in a polygynous Muslim marriage under the protection it affords to 'a spouse' and that s 1 of the Intestate Succession Act must be read as though the words 'or spouses' appear after the word 'spouse' wherever the latter word appears in s 1 of the Act. Moreover, in the application of ss 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act to the estate of a deceased person who is survived by more than one spouse, the following rules apply:

- '(a) a child's share in relation to the intestate estate of the deceased shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;
- (b) subject to paragraph (c), each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and

<sup>50</sup> Paragraph 23.2–23.3. Van Reenen J's formulation of the substitute provision corresponds with the qualification rule ordered by the Constitutional Court in *Bhe* in respect of the application of s 1(4)(f) in instances where a deceased subject to customary law is survived by more than one spouse. However, as Jacqueline Heaton 'Polygynous Muslim marriages' *JQR Family* (2008) 3(2.3) (<http://products.jutalaw.co.za/nxt/gateway.dll?f=templates&fn=default.htm> [accessed on 13 February 2009]) rightly points out, Van Reenen J's reading-in order substitutes 'the whole of' s 1(4)(f) with a provision which relates 'to the estate of a deceased person who is survived by more than one spouse.' The effect of this reading-in order is that s 1(4)(f) caters solely for de facto polygynous marriages and leaves the calculation of a child's share in monogamous marriages unregulated — a clearly untenable situation. It would have been preferable if Van Reenen J had ordered the provision to be read in as a paragraph (g), following s 1(4)(f). See also *supra* note 28.

<sup>51</sup> Paragraph 23.4.

<sup>52</sup> *Supra* note 8.

<sup>53</sup> Paragraph 48.

Constitutional Development by notice in the *Gazette*, whichever is the greater; and

- (c) where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be divided equally amongst the surviving spouses.<sup>54</sup>

Nkabinde J ordered further that the declaration of constitutional invalidity operates retrospectively with effect from 27 April 1994, except that it does not invalidate any transfer of ownership prior to the date of the order of any property pursuant to the distribution of the residue of an estate, unless it is established that, when transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application. Finally, the judge ordered that, should any serious administrative or practical problems arise in implementation of the order, any interested person may approach the Constitutional Court for a variation of the order.<sup>55</sup>

(7) *Govender v Ragavayah*

*Govender v Ragavayah*<sup>56</sup> concerned an application for an order that the word 'spouse' as used in s 1 of the Intestate Succession Act includes a surviving partner to a monogamous Hindu marriage.<sup>57</sup> The applicant and her late husband concluded a marriage in accordance with Hindu rites in 2004, which marriage was monogamous at all times.<sup>58</sup> The marriage was not registered in terms of the Marriage Act 25 of 1961 and no children were born from the marriage.<sup>59</sup> The applicant's husband died intestate on 1 January 2007.<sup>60</sup> Therefore, were the applicant to be successful, she would stand to inherit as the deceased's sole intestate heir in terms of s 1(1)(a) of the Intestate Succession Act.<sup>61</sup>

Moosa AJ concluded, having had regard to a number of decisions in which some consequences of a valid civil marriage were accorded legal recognition in respect of Muslim marriages, that there is judicial support for the proposition that a spouse of a marriage by Hindu rites may well have the

<sup>54</sup> Paragraph 54.

<sup>55</sup> Paragraph 55. The Constitutional Court in *Hassam* was not called upon to pronounce on Van Reenen J's ruling that a maintenance claim in terms of the Maintenance of Surviving Spouses Act can lie in the context of a polygynous Muslim marriage, particularly as the inclusion of multiple spouses under the word 'survivor' in the Act does not occasion an undue linguistic strain. Although Van Reenen J's reliance in this regard on s 6 of the Interpretation Act appears sound, a ruling by another court in future, along the lines of Nkabinde J's judgment in *Hassam*, that the words 'or survivors' should be read in wherever the word 'survivor' appears in the Maintenance of Surviving Spouses Act, would not come as a surprise.

<sup>56</sup> [2009] 1 All SA 371 (D).

<sup>57</sup> Paragraph 1.

<sup>58</sup> Paragraph 12.

<sup>59</sup> Paragraphs 12 and 13.

<sup>60</sup> Paragraph 9.

<sup>61</sup> Paragraph 22.

religious ‘marriage contract’ given some recognition by South African law for certain purposes.<sup>62</sup> The judge therefore ordered that the word ‘spouse’ as used in the Intestate Succession Act includes the surviving partner to a monogamous Hindu marriage. The applicant was consequently declared the spouse of the deceased for purposes of s 1 of the Intestate Succession Act and her entitlement to inherit from the deceased’s estate was confirmed.<sup>63</sup>

#### IV LEGISLATIVE DEVELOPMENTS THAT IMPACT ON THE PROVISIONS OF THE INTESTATE SUCCESSION ACT AND MAINTENANCE OF SURVIVING SPOUSES ACT

##### (1) *The Recognition of Customary Marriages Act*

Section 2(1)–(4) of the Recognition of Customary Marriages Act<sup>64</sup> stipulates that a valid customary marriage, existent at the commencement of the Act, is recognized as a marriage for all purposes. Moreover, a customary marriage entered into after the commencement of the Act, which complies with the Act’s requirements, is recognized as a marriage for all purposes. In regard to polygynous customary marriages, all valid customary marriages entered into by a person before the commencement of the Act are recognized as marriages for all purposes. Similarly, all customary marriages entered into by a person after the commencement of the Act, which comply with the Act’s provisions, are recognized as marriages for all purposes.

The Recognition of Customary Marriages Act brought an end to the limited recognition previously afforded to customary marriages only for certain purposes and conferred full legal recognition on such marriages. This recognition would serve as a catalyst for the further legal developments discussed hereunder in respect of customary marriages, inter alia, regarding intestate inheritance and spousal maintenance claims upon the termination of such a marriage through the death of one of the spouses.

##### (2) *The Repeal of the Black Administration Act and Amendment of Certain Laws Act*

Section 1(4)(b) of the Intestate Succession Act provides that, in the application of s 1 of the Act, ‘intestate estate’ includes, inter alia, any part of any estate in respect of which s 23 of the Black Administration Act does not apply. Section 23 of the Black Administration Act formerly regulated the administration of so-called ‘Black intestate deceased estates’, which estates would consequently not devolve in terms of the Intestate Succession Act. As indicated earlier, the Constitutional Court found that s 23 of the Black

<sup>62</sup> Paragraph 41.

<sup>63</sup> Paragraph 44. See also generally Christa Rautenbach ‘Indian succession laws with special reference to the position of females: A model for South Africa?’ (2008) 41 *CILSA* 105.

<sup>64</sup> The Act commenced on 15 November 2000.

Administration Act was unconstitutional.<sup>65</sup> This provision was repealed in its entirety by s 1(1) of the Repeal of the Black Administration Act and Amendment of Certain Laws Act.<sup>66</sup> The necessary implication of the repeal of s 23 of the Black Administration Act was that the intestate estate of any person who is subject to customary law would henceforth devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act — a state of affairs now acknowledged in the Reform of Customary Law of Succession and Regulation of Related Matters Act.<sup>67</sup>

(3) *The Civil Union Act*

Section 13 of the Civil Union Act<sup>68</sup> regulates the legal consequences of a civil union, namely that, in terms of s 13(1) of the Act, the legal consequences of a marriage as contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union. Moreover, s 13(2) prescribes that, with the exception of the Marriage Act and the Recognition of Customary Marriages Act, any reference to ‘marriage’ in any other law, including the common law, includes, with such changes as may be required by the context, a civil union and ‘husband,’ ‘wife’ or ‘spouse’ in any other law, including the common law, includes a civil-union partner.

(4) *The Reform of Customary Law of Succession and Regulation of Related Matters Act*

The Reform of Customary Law of Succession and Regulation of Related Matters Act<sup>69</sup> is aimed at, inter alia, modifying the customary law<sup>70</sup> of succession through provision for the devolution of certain property in terms of the law of intestate succession, and clarifying certain matters relating to the law of succession in relation to persons subject to customary law. To this end, the Act essentially confirms and elaborates on the state of the law after the *Bhe* case and the repeal of the Black Administration Act.

<sup>65</sup> *Bhe* supra note 24.

<sup>66</sup> The Act commenced on 12 April 2006. For a useful overview of judicial and legislative developments in respect of the administration of intestate estates of persons subject to customary law from the time of s 23 of the Black Administration Act up to the Repeal of the Black Administration Act and Amendment of Certain Laws Bill, 2005, see Lizmarie Kotzé & Christa Rautenbach ‘Bereddering van intestate boedels van swart persone: Van toeka tot nou’ (2007) 70 *THRHR* 43. See also M C Schoeman-Malan ‘Recent developments regarding South African common and customary law of succession’ (2007) 1 *PER* ([www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2007x1x\\_Schoeman\\_Malan\\_art.pdf](http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2007x1x_Schoeman_Malan_art.pdf)) [accessed 13 February 2009].

<sup>67</sup> See infra under IV(4).

<sup>68</sup> The Act commenced on 30 November 2006.

<sup>69</sup> The President assented to the Act on 19 April 2009, but the Act’s commencement date was yet to be proclaimed at the time of writing.

<sup>70</sup> ‘Customary law’ for purposes of the Act means, according to s 1 thereof, the customs and practices observed among the indigenous African people of South Africa which form part of the culture of those people.

Section 2(1) of the Act provides that, subject to the interpretation rules stipulated in s 2(2), the Intestate Succession Act regulates the devolution of the estate or part of the estate of any person who is subject to customary law and who dies after the commencement of the Act in so far as such person's estate does not devolve in terms of his or her will.

Section 2(2)(a)–(c) contains three interpretation rules in respect of the Intestate Succession Act. First, where the person referred to in the aforementioned s 2(1) is survived by a spouse,<sup>71</sup> as well as a descendant,<sup>72</sup> such a spouse must inherit a child's portion of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of justice by notice in the *Government Gazette*, whichever is the greater. Secondly, a woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house<sup>73</sup> must, if she survives him, be regarded as a descendant of the deceased. Finally, if the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased's house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased.

Section 3 of the Act instructs how an intestate estate is to be divided in accordance with the provisions of the Intestate Succession Act when the deceased's marital status was polygynous. First, s 3(1) determines that any reference in s 1 of the Intestate Succession Act to a spouse who survived the deceased must be construed as including every spouse and every woman

<sup>71</sup> 'Spouse' for purposes of the Act includes, according to s 1 thereof, a partner in a customary marriage that is recognized in terms of s 2 of the Recognition of Customary Marriages Act.

<sup>72</sup> 'Descendant' for purposes of the Act means, according to s 1 thereof, a person who is a descendant in terms of the Intestate Succession Act. Moreover, it also includes a person who is not a descendant in terms of the Intestate Succession Act but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child. This is likely to include, inter alia, children adopted in terms of customary law, children born from woman-to-woman marriages, children born from supporting marital unions as well as children procreated on behalf of a sterile husband. Section 1 determines further that 'descendant' for purposes of the Act also includes a woman referred to in s 2(2)(b) or (c) of the Reform of Customary Law of Succession and Regulation of Related Matters Act. However, see in the latter regard *infra* note 74. Given the Act's reference to 'a person who is a descendant in terms of the Intestate Succession Act,' it is noteworthy that the Intestate Succession Act contains no definition of 'descendant' for purposes of that Act. In *Flynn v Farr* 2009 (1) SA 584 (C) para 15 Davis J opined that, for purposes of the Intestate Succession Act, 'a descendant is for all intents and purposes "a child of the deceased."' It is submitted, however, that the judge's view in this regard is too narrow and that 'descendant' for purposes of the Intestate Succession Act generally includes also grandchildren, great-grandchildren, etc: see M J de Waal & M C Schoeman-Malan *Law of Succession* 4 ed (2008) 16.

<sup>73</sup> 'House' for purposes of the Act means, according to s 1 thereof, the family, property, rights and status which arise out of the customary marriage of a woman.

referred to in the aforementioned s 2(2)(a)–(c) of the Reform of Customary Law of Succession and Regulation of Related Matters Act.<sup>74</sup> Secondly, s 3(2) provides that, for purposes of the Reform of Customary Law of Succession and Regulation of Related Matters Act and in the application of s 1(1)(c) of the Intestate Succession Act, the following subparagraph must be regarded as having been added to that section:

‘(iii) where the intestate estate is not sufficient to provide each surviving spouse and woman referred to in paragraphs (a), (b) and (c) of section 2(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2008,<sup>75</sup> with the amount fixed by the Minister, the estate shall be divided equally between such spouses.’

Finally, s 3(3) stipulates that, in determining a child’s portion for purposes of dividing the estate of a deceased in terms of the Intestate Succession Act, s 1(4)(f) of that Act must be regarded to read as follows:

‘(f) a child’s portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived the deceased or have died before the deceased but are survived by their descendants, plus the number of spouses and women referred to in paragraphs (a), (b) and (c) of section 2(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2008.’

As remarked earlier, the above-stated provisions essentially confirm and elaborate on the state of the law after the *Bhe* case and the repeal of the Black Administration Act. However, further amendments to the Intestate Succession Act are prescribed in the Schedule to the Reform of Customary Law of Succession and Regulation of Related Matters Act, read with s 8 of the Act regarding the amendment of laws. First, s 1(2) of the Intestate Succession Act is substituted by the following subsection:

‘Notwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act and sections 40(3) and 297(1)(f) of the Children’s Act, 2005 (Act No. 38 of 2005), having been born out of wedlock shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.’

The above substitution is necessitated by the repeal of the Children’s Status Act 82 of 1987 (to which s 1(2) previously referred regarding children

<sup>74</sup> The contradiction between s 2(2)(b) and (c), on the one hand, and s 3, on the other, of the Act is perplexing: in terms of the former, a woman, as referred to in the paragraphs, is, upon surviving the deceased, regarded as a descendant of the deceased for purposes of intestate succession (see also the definition of ‘descendant’ in s 1 of the Act), whereas the self-same woman is, in terms of s 3, included as a surviving spouse of the deceased for purposes of the Intestate Succession Act.

<sup>75</sup> Certain sections of the Act still bear reference to 2008, the date of the last version of the Reform of Customary Law of Succession and Regulation of Related Matters Bill. This error will hopefully be corrected before the commencement of the Act.

conceived by artificial insemination) by the Children's Act 38 of 2005.<sup>76</sup> Section 40(3)<sup>77</sup> of the latter Act now contains corresponding provisions in respect of children conceived by artificial fertilisation in that it stipulates that, subject to s 296 of the Act, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete was or gametes were used for such fertilisation or the blood relatives of such a person. This rule is subject to a dual exception in that applicable rights, responsibilities, duties or obligations will arise when that person is the woman who gave birth to that child or that person was the husband of such woman at the time of the artificial fertilisation. Section 297(1)(f)<sup>78</sup> of the Children's Act stipulates that the effect of a valid surrogate motherhood agreement is that the child concerned will have no claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives.

Furthermore, inclusion of a reference to customary law in addition to 'any law or the common law' to which the s 1(2) of the Intestate Succession Act was previously confined, serves as confirmation of the ruling in *Bhe* that the rule of male primogeniture as applied in customary law in respect of inheritance on intestacy is inconsistent with the Constitution and invalid to the extent that it excluded or hindered, inter alia, children born out of wedlock from inheriting property.<sup>79</sup> Finally, substitution of the term 'illegitimacy' previously used in the subsection with the phrase 'having been born out of wedlock' is in line with the modern trend to use the latter rather than the former in statutory formulation.<sup>80</sup>

The repeal of s 23 of the Black Administration Act necessitates the second amendment prescribed in the Schedule, namely the deletion of the reference to s 23 from s 1(4)(b) of the Intestate Succession Act. This paragraph will henceforth simply read: "[I]ntestate estate" includes any part of an estate which does not devolve by virtue of a will'. Moreover, s 1(4)(e) of the Intestate Succession Act is amended by the insertion of a new para (eA):

'A person referred to in paragraph (a) of the definition of "descendant" contained in section 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009, shall be deemed —

- (i) to be a descendant of the deceased person referred to in that paragraph;
- (ii) not to be a descendant of his or her natural parent or parents, except in the case of a natural parent who is also the parent who accepted that person in accordance with customary law as his or her own child, as envisaged in the

<sup>76</sup> See the list of statutes repealed by the Children's Act in Schedule 4 thereof. The repeal of the Children's Status Act is effective from 1 July 2007.

<sup>77</sup> Section 40 commenced on 1 July 2007.

<sup>78</sup> Section 297 was not yet in operation at the time of writing.

<sup>79</sup> *Bhe* supra note 5 para 93.

<sup>80</sup> See eg s 2D(1)(b) of the Wills Act 7 of 1953 as inserted by s 4 of the Law of Succession Amendment Act 43 of 1992; s 1(1) of the Births and Deaths Registration Act 51 of 1992; s 36 of the Children's Act.



said definition, or was, at the time when the child was accepted, married to the parent who so accepted the child.’

Finally, s 1(5) of the Intestate Succession Act is amended by the insertion of a new subsec (5A):

‘If a person referred to in paragraph (a) of the definition of “descendant” contained in section 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009, is deemed to be a descendant of the deceased person referred to in that paragraph or is deemed not to be a descendant of his or her natural parent, the deceased person shall be deemed to be an ancestor of the person referred to in that paragraph, or shall be deemed not to be an ancestor of that person, as the case may be.’

It is submitted that the last-mentioned two amendments were necessitated particularly by the recognition of adoption in terms of customary law, in the alternative to adoption in terms of ‘western law,’ in cases such as *Kewana v Santam Insurance Co Ltd*<sup>81</sup> and *Metiso v Padongelukkefonds*,<sup>82</sup> but also in order to provide expressly for the other possibilities created by the definition of ‘descendant’ in s 1 of the Act.<sup>83</sup>

The Schedule of the Reform of Customary Law of Succession and Regulation of Related Matters Act also contains an amendment to the definition of ‘survivor’ in s 1 of the Maintenance of Surviving Spouses Act. This definition is to read:

“[S]urvivor” means the surviving spouse in a marriage dissolved by death, and includes a spouse of a customary marriage which was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act No. 38 of 1927), but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988)).’

This amendment confirms the protection afforded to the so-called ‘discarded spouse’ by s 1(f) of the Marriage and Matrimonial Property Law Amendment Act of 1988. This provision substituted s 22(7) of the Black Administration Act with the provision that, should a husband in a customary union have contracted a marriage<sup>84</sup> after the commencement of the Black Administration Act but before the commencement of the Marriage and Matrimonial Property Law Amendment Act with any woman other than his wife, such a marriage would not affect the material rights of his partner to the customary

<sup>81</sup> 1993 (4) SA 771 (TkA) at 776B–D.

<sup>82</sup> 2001 (3) SA 1142 (T) at 1149A–H.

<sup>83</sup> See *supra* note 72.

<sup>84</sup> ‘Marriage’ for purposes of the Black Administration Act was defined, in s 35 thereof, as ‘the union of one man with one woman in accordance with any law for the time being in force in any Province governing marriages, but does not include any union contracted under Black law or custom or any union recognized as a marriage in Black law under the provisions of section *one hundred and forty-seven* of the Code of Black Law contained in the Schedule to Law 19 of 1891 (Natal) or any amendment thereof or any other law.’



union or any issue thereof. Moreover, the widow of any such marriage and the issue thereof would have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the marriage had been a customary union.

(5) *The draft Bill on Islamic Marriages*<sup>85</sup>

The draft Bill on Islamic Marriages (as proposed in the report of the South African Law Reform Commission on Islamic Marriages and Related Matters in Discussion Paper 101, Project 59) is aimed at, inter alia, providing for the recognition of Islamic marriages.<sup>86</sup> To this end, s 4(1)–(5) of the Bill stipulates that an Islamic marriage entered into before the commencement of the Islamic Marriages Act (once enacted) and existing at the commencement of the Act is for all purposes recognized as a valid marriage. Moreover, an Islamic marriage entered into after the commencement of the Act, which complies with the Act's requirements, is for all purposes recognized as a valid marriage. In regard to polygynous Islamic marriages it is determined that, if a husband is a spouse in more than one Islamic marriage, all Islamic marriages entered into by him before the commencement of the Act are for all purposes recognized as valid marriages. Moreover, if a husband is a spouse in more than one Islamic marriage, all such marriages entered into after the commencement of the Act, which comply with the Act's provisions, are for all purposes recognized as valid marriages. Finally, if a husband is a spouse in an existing civil marriage and in an Islamic marriage or marriages entered into before the commencement of the Act, such Islamic marriage is or marriages are for all purposes recognized as valid marriages.

Moreover, s 16(3) of the Bill provides, regarding amendments to the Intestate Succession Act, that s 1 of the Act is amended by the following addition to subsec (4):

- ‘(g) “spouse” shall include a spouse of an Islamic marriage recognised in terms of the Islamic Marriages Act, 20.. , and shall otherwise include the spouse of a deceased person in a union recognised as a marriage in accordance with the tenets of any religion:<sup>87</sup> Provided that in the event of a deceased man being survived by more than one spouse, the following shall apply —

<sup>85</sup> The Bill is available at [www.saflii.org//cgi-bin/disp.pl?file=za/other/zalc/report/2003/3/2003\\_3-ANNEXURE-2.html&query=islamic%20marriages%20bill](http://www.saflii.org//cgi-bin/disp.pl?file=za/other/zalc/report/2003/3/2003_3-ANNEXURE-2.html&query=islamic%20marriages%20bill) [accessed on 16 May 2009]. In *Women's Legal Centre Trust v President of the Republic of South Africa* 2009 (6) SA 94 (CC) the applicant sought an order from the Constitutional Court that would compel the President and Parliament to enact the Bill on Islamic Marriages, thereby making it law. The Constitutional Court ruled that the application is ‘misconceived’ as it (the Constitutional Court) could not serve as the court of first instance in the matter.

<sup>86</sup> ‘Islamic marriage’ for purposes of the draft Bill means, according to s 1 thereof, a marriage contracted in accordance with Islamic law only, but excludes an existing civil marriage, or a civil marriage solemnized under the Marriage Act, before or after the commencement of the Act (should the draft Bill become law).

<sup>87</sup> The paragraph's reference to ‘a marriage in accordance with the tenets of any religion,’ thereby including marriages other than those concluded in accordance with Muslim rites, is significant in light of *Govender's* case *supra* note 56.

- (i) for the purposes of subsection (1)(c), such surviving spouse shall inherit the intestate estate in equal shares;<sup>88</sup>
- (ii) for the purposes of subsection (1)(c), such surviving spouses shall each inherit a child's share of the intestate estate or so much of the intestate estate in equal shares as does not exceed in value the amount so fixed as contemplated in this section.'

Section 16(4) of the Bill provides in regard to amendments to the Maintenance of Surviving Spouses Act that s 1 of the Act is amended by the following insertion after the definition of 'survivor':

"Marriage" shall include an Islamic marriage recognised in terms of the Islamic Marriages Act, 20.. , and shall otherwise include a union recognised as a marriage in accordance with the tenets of any religion.'

(6) *The draft Domestic Partnerships Bill*<sup>89</sup>

Section 1 of the draft Domestic Partnerships Bill defines 'domestic partnership' as 'a registered domestic partnership or unregistered domestic partnership between two persons who are both 18 years of age or older and includes a former domestic partnership.' 'Domestic partner' is defined in s 1 as 'a partner in a domestic partnership and includes a former domestic partner.' Section 19 of the Bill determines that, for purposes of the Domestic Partnerships Act (once enacted), 'spouse' in the Maintenance of Surviving Spouses Act must be construed to include a registered domestic partner. Likewise, s 20 of the Bill provides that, for purposes of the Domestic Partnerships Act (once enacted), 'spouse' in the Intestate Succession Act must be construed to include a registered domestic partner. Therefore, registered domestic partners will have claims under both the aforementioned statutes should the draft Bill become law.

As far as unregistered domestic partners are concerned, s 29 of the Bill permits a surviving unregistered domestic partner to bring an application to court, after the death of the other unregistered domestic partner, for an order for the provision of the survivor's reasonable maintenance needs from the deceased partner's estate. This claim is, in terms of ss 29 and 30, in format and substance akin to a claim under the Maintenance of Surviving Spouses Act.

Section 31 of the Bill provides as follows for intestate succession on the death of an unregistered domestic partner:

'(1) Where an unregistered domestic partner dies intestate, his or her surviving unregistered domestic partner may bring an application to court, subject to subsections (2) and (3), for an order that he or she may inherit the intestate estate.

(2) Where the deceased is survived by an unregistered domestic partner as well as a descendant, such unregistered domestic partner inherits a child's share

<sup>88</sup> This formulation appears incorrect; presumably it should read: 'for the purposes of subsection (1)(a), such surviving spouses shall inherit the intestate estate in equal shares.'

<sup>89</sup> The draft Bill was published in GG 30663 of 14 January 2008.

of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of Justice by notice in the *Gazette*, whichever is the greater, as provided for in the Intestate Succession Act.

(3) In the event of a dispute between a surviving unregistered domestic partner and the customary spouse of a deceased partner regarding the benefits to be awarded, a court may, upon application by either the unregistered domestic partner or the customary spouse, make an order that it regards just and equitable with reference to all the relevant circumstances of both relationships.’

## V THE BILL OF RIGHTS’ FOUNDATIONAL VALUES FOR THE ESTABLISHMENT OF THE CONSTITUTIONAL FAMILY IN THE LAW OF SUCCESSION

Predictably, the judicial and legislative developments highlighted above centred on the central theme of the Bill of Rights’ foundational values of equality<sup>90</sup> and human dignity.<sup>91</sup> For example, in *Daniels v Campbell Sachs* J opined that the ‘constitutional values of equality, tolerance and respect for diversity point strongly in favour of giving the word “spouse” [for purposes of the two Acts under discussion] a broad and inclusive construction;’<sup>92</sup> an opinion shared by Ngcobo J: ‘[i]t follows therefore that the word “spouse” must now be construed in a manner that is consistent with the foundational values of human dignity, equality and freedom.’<sup>93</sup> In *Gory v Kolver (Starke & others intervening)* Van Heerden AJ concluded in similar vein that ‘Mr Gory has established that the failure of s 1(1) of the [Intestate Succession] Act to include him and others similarly situated to him within its ambit does violate his rights to equality and dignity.’<sup>94</sup> Likewise, the preamble of the Reform of Customary Law of Succession and Regulation of Related Matters Act declares that the Act is premised, inter alia, upon the fact that ‘section 9 of the Constitution provides that everyone has the right to equal protection and benefit of the law.’

A number of sub-themes, all closely related to the aforementioned foundational values of equality and human dignity, also emerge from the judgments, legislation and bills discussed above. One such theme is that of extending the protection afforded by the Intestate Succession Act and Maintenance of Surviving Spouses Act to particularly vulnerable groupings in society. For example, Sachs J remarked in his dissenting judgment in *Vols v Robinson* that ‘[w]omen and children are vulnerable groups in our society. . . The lack of legal protection afforded to domestic partnerships increases the vulnerability of these groups living within such arrange-

<sup>90</sup> Section 9 of the Constitution, 1996.

<sup>91</sup> Section 10 of the Constitution, 1996.

<sup>92</sup> Supra note 4 para 21.

<sup>93</sup> Ibid para 56.

<sup>94</sup> Supra note 7 para 40. See also *Hassam* supra note 8 paras 37, 38 and 46.

ments.<sup>95</sup> Another sub-theme is that of not perpetuating the past marginalization of certain groupings in society, which theme is evident in Van Heerden AJ's remark in *Gory v Kolver* that '[b]earing in mind the significant pre-existing disadvantage and vulnerability of same-sex life partners resulting from "the long history in our country and abroad of marginalisation and persecution of gays and lesbians", it would not in my view be just and equitable to deny Mr Gory any effective and equitable relief. . .'.<sup>96</sup>

A further sub-theme is that of the legal recognition of and equal treatment in regards to the social function of relationships other than those constituted through civil marriage. An example of this theme is found in the opinion of Mokgoro and O'Reagan JJ in their dissenting judgment in *Volks v Robinson* that '[w]here relationships which are socially and functionally similar to marriage are not regulated in the same way as marriage, discrimination on the grounds of marital status will arise.'<sup>97</sup> A final sub-theme is the need for the law to accommodate the diversity that typifies South African society. In *Robinson v Volks* Davis J alluded in this regard to the Constitutional Court's recognition of the diversity of forms of life-partnership 'and that marriage represents but one form of life partnership.'<sup>98</sup>

In light of the above, it is submitted that the development of the constitutional family in the law of succession is founded not only on core constitutional values, but also on the socio-economic and legal realities that establish the operational framework for these values.

## VI A CONTEXTUALIZED EXPOSITION OF THE JUDICIAL AND LEGISLATIVE DEVELOPMENTS TO DATE AND LEGISLATIVE DEVELOPMENTS (LIKELY) IN THE FUTURE REGARDING THE CONSTITUTIONAL FAMILY FOR PURPOSES OF THE INTTESTATE SUCCESSION ACT AND THE MAINTENANCE OF SURVIVING SPOUSES ACT

### (1) *The term 'spouse' in the Intestate Succession Act and the Maintenance of Surviving Spouses Act*

The table below summarizes the foregoing synopsis of the current legal position in respect of the re-definition of the term 'spouse' for purposes of the aforementioned two statutes.

<sup>95</sup> Supra note 6 para 171. See also *Bhe* supra note 5 para 93; *Hassam* supra note 46 para 12; *Hassam* supra note 8 paras 41 and 49.

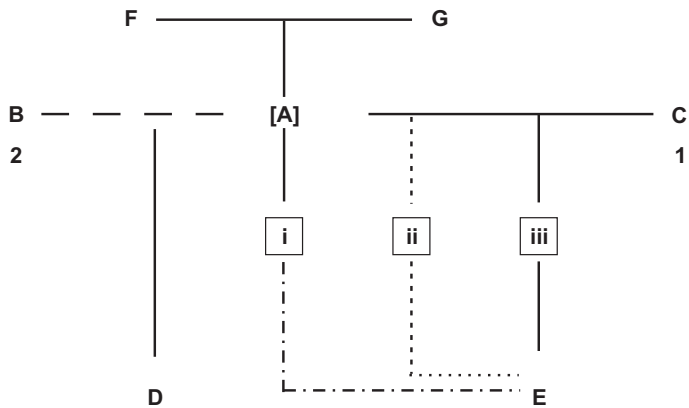
<sup>96</sup> Supra note 7 para 40.

<sup>97</sup> Supra note 6 para 108. See also the preamble of the Civil Union Act and the preamble of the Reform of Customary Law of Succession and Regulation of Related Matters Act.

<sup>98</sup> Supra note 29 at 677F. See also *Hassam* supra note 8 paras 27 and 46.

Intestate Succession Act:	Maintenance of Surviving Spouses Act:
<p>In terms of current law ‘spouse’ (meaning the deceased’s surviving spouse) includes:</p> <ul style="list-style-type: none"><li>• a partner to a valid civil marriage</li><li>• a civil-union partner</li><li>• a partner to a monogamous Muslim marriage</li><li>• a partner to a monogamous Hindu marriage</li><li>• a partner to a customary-law marriage and, if the deceased’s marital status was polygynous, each such partner</li><li>• a partner to a permanent same-sex life-partnership in which the partners have undertaken reciprocal duties of support</li><li>• each partner to a Muslim marriage where the deceased’s marital status was polygynous</li></ul> <p>In terms of the draft Bill on Islamic Marriages ‘spouse’ includes:</p> <ul style="list-style-type: none"><li>• a partner to an Islamic marriage recognized in terms of the Islamic Marriages Act (once enacted) and the partner in a union recognized as a marriage in accordance with the tenets of any religion; if the deceased’s marital status was polygynous, then each such partner</li></ul> <p>In terms of the draft Domestic Partnerships Bill ‘spouse’ includes:</p> <ul style="list-style-type: none"><li>• a registered domestic partner, but an unregistered partner can apply to court for an order permitting inheritance ab intestato</li></ul>	<p>In terms of current law ‘spouse’ in respect of the definition of ‘survivor’ includes:</p> <ul style="list-style-type: none"><li>• a partner to a valid civil marriage</li><li>• a civil-union partner</li><li>• a partner to a monogamous Muslim marriage</li><li>• a partner to a customary-law marriage, which includes a customary-law marriage that was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929, but before 2 December 1988 and, if the deceased’s marital status was polygynous, then each such partner</li><li>• each partner to a Muslim marriage where the deceased’s marital status was polygynous</li></ul> <p>In terms of the draft Bill on Islamic Marriages ‘spouse’ includes:</p> <ul style="list-style-type: none"><li>• a partner to a marriage, which includes an Islamic marriage recognized in terms of the Islamic Marriages Act (once enacted) and a union recognized as a marriage in accordance with the tenets of any religion; if the deceased’s marital status was polygynous, then each such partner</li></ul> <p>In terms of the draft Domestic Partnerships Bill ‘spouse’ includes:</p> <ul style="list-style-type: none"><li>• a registered domestic partner, but an unregistered partner can apply to court for an order for the provision of reasonable maintenance</li></ul>

(2) *The operation of the Intestate Succession Act regarding the deceased’s surviving spouse(s) and descendant(s)*



(a) *The traditional operation of the Intestate Succession Act*

The Intestate Succession Act's traditional operation pertains to the scenario on the right-hand side of the above diagram, namely where the deceased, A, who was a spouse in a valid monogamous civil marriage (Marriage 1), leaves a surviving spouse, C, and (for ease of discussion) one descendant, E.

C, as A's surviving spouse, and E, as A's surviving intestate heir in the first parentela, share A's estate only if its net value exceeds R125 000.<sup>99</sup> If it does not, C inherits the entire estate; if it does, but the estate's net value is less than R250 000, C inherits R125 000 of A's estate and E the (lesser) residue. If the estate's net value is equal to or exceeds R250 000, C and E each inherit an equal child's share of A's estate.<sup>100</sup> A child's share of the estate is calculated by dividing its monetary value by two, which number represents E, as A's sole surviving child, plus one.<sup>101</sup> Moreover, should E, a mentally healthy major, renounce the right to receive her share of A's estate, such share vests in C.<sup>102</sup>

E inherits as indicated above in three scenarios. First, where E is the natural child of A, born out of wedlock: E(i).<sup>103</sup> Secondly, where E is an adopted child; either one not biologically related to either A or C and adopted by both A and C jointly: E(ii),<sup>104</sup> or, alternatively, the child of C (whether from a previous marriage, previously adopted or born out of wedlock with someone other than A as biological parent) and adopted by A<sup>105</sup> (for the sake of

<sup>99</sup> See *supra* note 14.

<sup>100</sup> Section 1(1)(c)(i) and (ii).

<sup>101</sup> Section 1(4)(ff).

<sup>102</sup> Section 1(6). The Report on the Review of the Law of Succession (Project 22) of June 1991 of the South African Law Commission (as it then was) reveals, in paragraphs 5.48 and 5.53 thereof, that the insertion of s 1(6) in the Intestate Succession Act (by s 14(b) of the Law of Succession Amendment Act) was motivated by the practical consideration 'of children repudiating their inheritance in favour of the surviving spouse.' One can surmise that the Law Commission and, indeed, the Legislature had in mind in this regard a child's renunciation of a right in favour of his or her parent, but the formulation of s 1(6) of the Act, bearing general reference to 'a descendant of the deceased', suggests that a repudiation by eg a child of the deceased born out of wedlock will also result in accrual of the repudiated share in favour of the deceased's surviving spouse, even if such spouse is not the biological parent of the repudiating descendant.

<sup>103</sup> Section 1(2).

<sup>104</sup> Section 17(a) of the Child Care Act 74 of 1983 determines that a child may be adopted by a husband and his wife jointly. The position of the adopted child in the law of intestate succession is governed by a reading-together of ss 17, 20(1) and 20(2) of the Child Care Act with s 1(4)(e) and 1(5) of the Intestate Succession Act. See De Waal & Schoeman-Malan *supra* note 72 at 28–9. In *Flynn v Farr* *supra* note 72 para 21, Davis J held that these provisions apply to *ex lege* adoptions only and find no application in respect of so-called *de facto* adoptions.

<sup>105</sup> Section 17(c) of the Child Care Act determines that a child may be adopted by a married person whose spouse is the parent of that child. Section 1(4)(e)(ii) of the Intestate Succession Act renders intestate succession possible between an adopted child and his or her natural parent if the natural parent was married to the adoptive parent at the time of the adoption. Section 1(4)(e)(i) and (5) of the Intestate Succession Act determines that, in the application of s 1 of the Act, an adopted child is

simplicity the latter scenario is not indicated on the diagram). Finally, where E is the natural child of A, born from the marriage between A and C: E(iii).

F and G (A's surviving parents) inherit A's estate (in equal shares) only if neither C nor E survives A.<sup>106</sup>

(b) *Legal development to date regarding Marriage 1*

First, unions other than valid monogamous civil marriages were brought within the ambit of the Intestate Succession Act. The Act currently also applies<sup>107</sup> where A and C were civil-union partners; A and C were spouses in a monogamous Muslim marriage; A and C were spouses in a monogamous Hindu marriage; A and C were spouses in a valid monogamous customary-law marriage and A and C were partners in a permanent same-sex life-partnership in which they undertook reciprocal duties of support.<sup>108</sup>

Secondly, the Civil Union Act expanded the rules governing adoption, which, in turn, affected the position of the adopted child (E(ii)) under the Intestate Succession Act. As indicated earlier, the Child Care Act determines that a child may be adopted, inter alia, by a husband and his wife jointly.<sup>109</sup> The prescript in s 13(2) of the Civil Union Act that 'marriage', 'husband' and 'wife' are inclusive of civil-union partners, brought such partners within the ambit of the Child Care Act in so far as the latter Act bears reference to 'marriage',<sup>110</sup> 'husband'<sup>111</sup> and 'wife'<sup>112</sup> for purposes of adoption. As the adopted child's position regarding inheritance on intestacy is regulated by both the Child Care Act and the Intestate Succession Act,<sup>113</sup> adoptive civil-union partners are therefore adoptive parents for purposes of inheritance ab intestato, either inheritance by the adoptive civil-union partners from their adopted child or inheritance by the adopted child from the adoptive civil-union partners.

deemed the descendant of his or her adoptive parent(s) and that the adoptive parent(s) is/are deemed the ancestor(s) of the adopted child.

<sup>106</sup> Section 1(1)(d)(i).

<sup>107</sup> See the table *supra* under VI (1).

<sup>108</sup> See Wood-Bodley *supra* note 42 at 54ff on why the conferment of a right to intestate inheritance on same-sex life-partners, while heterosexual life-partners are not afforded a similar right, is not anomalous. However, note the draft Domestic Partnerships Bill *supra* under IV (6).

<sup>109</sup> *Supra* note 104.

<sup>110</sup> Section 1 of the Child Care Act determines that 'marriage' for purposes of the Act means any marriage which is recognized in terms of South African law or customary law, or which was concluded in accordance with a system of religious law subject to specified procedures, and any reference to a husband, wife, widower, widow, divorced person, married person or spouse shall be construed accordingly. Section 1 of the Children's Act contains a similar provision.

<sup>111</sup> Section 17(a).

<sup>112</sup> Section 17(a).

<sup>113</sup> *Supra* note 104.

(c) *Future legal development regarding Marriage 1*<sup>114</sup>

Further changes to the rules governing adoption will occur when the Children's Act's repeal of the Child Care Act<sup>115</sup> and the implementation of the Children's Act's adoption provisions are proclaimed; thereby affecting the position of the adopted child in the law of intestate succession. Section 231 of the former Act<sup>116</sup> makes provision for a range of possible adoptive parents; for purposes of this discussion the following possibilities deserve mention:

- a husband and wife,<sup>117</sup> which, as already indicated, currently includes civil-union partners;
- partners in a permanent domestic life-partnership;<sup>118</sup>
- other persons sharing a common household and forming a permanent family unit;<sup>119</sup>
- a married person whose spouse is the parent of the child or a person whose permanent domestic life-partner is the parent of the child.<sup>120</sup>

The last-mentioned three possibilities will in future render inheritance ab intestato possible between a child and his or her adoptive permanent domestic life-partners, adoptive persons sharing a common household and forming a permanent family unit or the adoptive spouse or adoptive permanent domestic life-partner of the child's parent<sup>121</sup> through a reading-together of s 1(4)(e)(i) and (ii) of the Intestate Succession Act and s 231(1) of the Children's Act.

(d) *The operation of the Intestate Succession Act regarding polygynous marriages*

The Intestate Succession Act now also operates where the marital status of the deceased, A, was polygynous by reason of Marriages 1 and 2 on the diagram; ie where A left two surviving spouses, C and B, and (for ease of discussion) two descendants, E and D.<sup>122</sup>

<sup>114</sup> The discussion on the changes that will be effected upon the commencement of the Reform of the Customary Law of Succession and Regulation of Related Matters Act is not repeated here.

<sup>115</sup> See Schedule 4 of the Children's Act.

<sup>116</sup> Section 231 had not commenced at the time of writing.

<sup>117</sup> Section 231(1)(a)(i).

<sup>118</sup> Section 231(1)(a)(ii). Note that the Children's Act does not limit domestic life-partnerships for this purpose to heterosexual partners; therefore, same-sex permanent domestic life-partners will also be able to adopt.

<sup>119</sup> Section 231(1)(a)(iii).

<sup>120</sup> Section 231(1)(e).

<sup>121</sup> In the last-mentioned instance, inheritance ab intestato between the adopted child and the particular natural parent remains possible as is currently the case under s 1(4)(e)(ii) of the Intestate Succession Act.

<sup>122</sup> The explanation that follows is generic in so far as it is based on the general principles stated in the *Bhe* and *Hassam* judgments as well as the provisions of the Reform of Customary Law of Succession and Regulation of Related Matters Act and the draft Bill on Islamic Marriages, but without taking arrangements peculiar to the



C and B, as A's surviving spouses, as well as D and E, as A's surviving intestate heirs in the first parentela, share the estate only if its net value exceeds R250 000. If it does not, C and B inherit A's entire estate in equal shares.<sup>123</sup> If it does, but the estate's net value is less than R500 000, C and B each inherit R125 000 of A's estate and D and E the (lesser) residue in equal shares. However, if the estate's net value is equal to or exceeds R500 000, C, B, D and E each inherit an equal child's share of A's estate.<sup>124</sup> A child's share of the estate is calculated by dividing its monetary value by four, which number represents D and E, as A's surviving children, plus two (the number of A's surviving spouses).<sup>125</sup> Moreover, should E, a mentally healthy major, renounce the right to receive her share of A's estate, it is arguable that such share will vest in equal shares in B and C.<sup>126</sup> F and G (A's surviving parents) inherit A's estate (in equal shares) only if B, C, D and E do not survive A.<sup>127</sup>

## VII CONCLUSION

Despite the static image that the law of succession often projects,<sup>128</sup> it is a vibrant area of the law that has undergone dramatic changes in recent times and will continue to do so in future. These changes, necessitated by constitutional demands of equality and human dignity as well as socio-economic and legal realities regarding the devolution of deceased estates ab intestato and deceased estates' liability for spousal maintenance claims, were predicted shortly after the advent of South Africa's democratic constitutional dispensation.<sup>129</sup> However, commentators also warned that law reform in this area would be difficult, particularly in light of the 'bewildering range of possibilities' that come to mind if the law is to cater for intestate inheritance claims and maintenance claims against a deceased estate by persons who are not traditionally regarded as the surviving spouse in a civil marriage.<sup>130</sup> It is heartening to see that the South African legislature and courts are facing

Act and Bill (eg a customary-law union between the deceased and a woman for the purpose of providing children for the deceased's spouse's house) into account.

<sup>123</sup> Section 1(1)(a).

<sup>124</sup> Section 1(1)(c)(i) and (ii).

<sup>125</sup> Section 1(4)(f) (as amended or, alternatively, supplemented by a paragraph (g) in future).

<sup>126</sup> Section 1(6). The Constitutional Court in *Hassam* was explicit that the words 'or spouses' follow the word 'spouse' wherever the latter words appears in s 1 of the Act; therefore also for purposes of s 1(6) of the Act. The position explained supra in note 102 will therefore apply mutatis mutandis here: even if B is not the biological parent of E, a renunciation by E, as descendant of A, occasions, on a literal interpretation of s 1(6) and given the position prescribed in *Hassam* in respect of polygynous marriages, the vesting of a share of the repudiated benefit not only in C, but also in B, as A's two surviving spouses.

<sup>127</sup> Section 1(1)(d)(i).

<sup>128</sup> See De Waal supra note 9 at 162.

<sup>129</sup> Ibid at 173–4.

<sup>130</sup> Ibid at 173, quoting S M Cretney 'Reform of intestacy: The best we can do?' (1995) 111 *The Law Quarterly Review* 77 at 93–4.

head-on the difficulties and challenges occasioned by giving legal shape to the constitutional family in the law of succession. Moreover, it shows that the law of succession is at the forefront of constitutional development!